IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

FAO (MVA) Nos. 231 of 2001 &
530 of 2000.
Judgement reserved on: 23.10.2006
Decided on : November 6, 2006.

(For title, see reverse).

Coram
The Hon'ble Mr. Justice Surjit Singh, Judge.
Whether approved for reporting?[1]
For the Appellant :
(See reverse)
For the Respondents :

Surjit Singh, Judge.

These two appeals are being disposed of by a common judgement, because they are directed against the same award, i.e. award dated 17.6.2000 of Motor Accident Claims Tribunal (II), Solan, camp at Nalagarh, passed in MAC Petition No. 40-NL/2 of 1997.

2. First the facts relevant for the disposal of two appeals may be noticed. Kapil Dev, appellant in FAO(MVA) No. 231 of 2001, hereinafter referred to as petitioner, filed a petition, under Section 166 of the Motor Vehicles Act, seeking award of compensation for the injuries, which he claimed to have sustained in an accident involving his motor-cycle and scooter No. HP 12-1538. The scooter belonged to Rani Sood, respondent No.1 in FAO(MVA) No. 231 of 2001 and it was insured for third party risk with National Insurance Company

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Whether the reporters of the local papers may be allowed to see the Judgment?

Limited, appellant in FAO(MVA) No. 530 of 2000. Rani Sood, is being referred to as respondent No.1, and National Insurance Company as respondent No.2 , hereinafter.

3. It was alleged that the petitioner was going on his motor-cycle on Kalka- Nalagarh road when scooter No. HP-12-1538 being driven by one Shera appeared from the opposite direction and all of a sudden turned towards the motor-cycle of the petitioner and rammed into it. As a result of that accident, Shera who was driving the scooter died on the spot. Petitioner Kapil Dev sustained multiple injuries, including commuted fracture of right arm, resulting in 80% permanent disability of said arm. The petitioner was aged 20 years and he followed the occupation of civil contractor and was registered with P.W.D. as a contractor and his monthly income was to the tune of Rs. 7,000/-. It was alleged that a sum of Rs. 1.5 lacs had been spent on treatment, but the fracture had still not properly united and had in fact resulted in permanent disability to the extent of 80%.

4. Respondent No.1 Rani Sood took the plea that on the relevant day, her husband had used that scooter for going to his shop and that when the scooter was parked outside the shop, Shera, who allegedly caused the accident, took away that scooter without the knowledge of her husband and caused the accident. She denied that the accident took place due to rash driving of the scooter by Shera and instead pleaded that the accident took place because of rash or negligent driving of the motor-cycle by the petitioner.

5. Respondent No.2, the Insurance Company took the plea that Shera alias Sher Singh, who was driving scooter did not possess

a valid and effective driving licence, and thus there was breach of condition of the policy as to the person entitled to drive the scooter and on account of breach of this condition, it (insurance company) was not liable to pay compensation. It was also alleged that there were no valid documents, like R.C and fitness certificate in respect of the scooter and because of this reason also, it was not liable to pay the compensation. Further, it was alleged that the accident had taken place due to rash or negligent driving of the motor-cycle itself, because a criminal case with respect to the accident had been registered against the petitioner, under Sections 279, 337 and 304-A, I.P.C., and even a challan had been filed against him in the court of concerned Judicial Magistrate. In the alternative, it was alleged that it was a case of contributory negligence on the part of drivers of both the motor-cycle and the scooter and hence the petitioner was not entitled to the total amount of compensation that the Tribunal might assess.

6. Motor Accident Claims Tribunal framed the following issues, on the pleadings of the parties:-

1. Whether the petitioner on 15.5.1997 at village Kishanpura sustained injuries due to rash and negligent driving of scooter bearing No. HP-12-1538 by Sher Singh alias Shera deceased driver, as alleged? OPP.

2. If issue No. 1 is proved, whether the petitioner is entitled for compensation, if so, to what extent and from whom? OPP.

3. Whether Shri Sher Singh alias Shera was unauthorisedly driving the vehicle bearing No. HP-12-1538 without knowledge or consent of respondent No.1, if so, to what effect? OPR-1.

4. Whether the petitioner had a valid driving licence to drive the bike at the time of accident? OPP.

5. Whether Shri Sher Singh alias Shera had valid driving licence to drive the scooter? OPR.

6. Relief.

7. On the conclusion of the inquiry, the Tribunal returned the finding that the accident had taken place due to negligence of the drivers of both the motor-cycle and the scooter and thus it was a case of contributory negligence. Petitioner was held to be entitled to a sum of Rs. 1,50,000/-, by way of compensation. Shera was held to have driven the scooter without the knowledge or the consent of respondent No. 1. As regards issue No. 4, it was held that the petitioner possessed a valid and effective driving licence. As regards issue No. 5, finding was returned against the respondent, meaning thereby that it was held that Shera alias Sher Singh possessed a licence.

8. As a result of the above finding, the Tribunal awarded a sum of Rs. 1,50,000/- by way of compensation in favour of the petitioner and against both the respondents and directed the Insurance Company to pay the compensation money with interest.

9. Petitioner in his appeal has assailed the finding that he was guilty of contributory negligence. He is also aggrieved by the

finding as to the quantum of compensation. According to him, he should have been awarded the entire amount of compensation of rupees four lacs, as claimed in the petition, because the injuries have resulted in permanent disability to the extent of 80% and huge expenditure has been incurred on medical treatment.

10. Grievance of the Insurance Company, who has filed the other appeal, is that since Shera, who was driving the scooter did not possess any driving licence, liability for payment of compensation could not have been fastened upon it. Its further plea is that the compensation assessed by the Tribunal was required to be reduced to half on account of the finding that the petitioner was guilty of contributory negligence.

11. I have heard the learned counsel for the parties and gone through the record. Petitioner examined himself as PW 1 and one Pankaj Sharma, PW 2, who claimed to have been riding the pillion of the motor-cycle when the accident took place. Both of them testified that the accident took place because the scooter which came from the opposite direction turned towards their motor-cycle all of a sudden and rammed into it. The testimony of the petitioner and PW 2 Pankaj Sharma, is controverted by RW 2 Ramesh Chand, who claims that he was riding the pillion of the scooter that was driven by Shera. He stated that the scooter was being driven at normal speed and his left side by deceased Shera. Admittedly, a criminal case on account of the occurrence of the accident, in question, has been instituted by the police against the petitioner. This case had been registered on the basis of the FIR lodged by Ramesh Chand, RW 2, who claims to have

been riding the scooter. Petitioner has also examined one draftsman PW 3 Sohan Lal, who prepared the site plan Ex. P-1 and as per this site plan, the scooter was found lying on the wrong side of the road after the accident, while the motor-cycle was found on the right side. It is because of the aforesaid contradictory and ambiguous evidence that the Tribunal has returned the finding that it appears to be a case of contributory negligence. I see no reason to disagree with this finding of fact returned by the Tribunal.

12. Petitioner is also dissatisfied with the quantum of compensation awarded by the Tribunal. According to him, the evidence on record very clearly establishes that he had net income of Rs. 2,95,716/- for the assessment year 1997-98, while in the next following year, his income came down to Rs. 1,42,310/-, because of his inability to follow his occupation effectively on account of the injuries sustained in the accident. There is absolutely no evidence in support of this contention of the appellant-petitioner, except that he produced Photostat copy of some income tax clearance certificate, in which income for the assessment year 1997-98 is stated to be Rs. 2,95,720/- out of which an amount of Rs. 81,342/- is stated to have been paid on account of income tax. This copy has not been proved. As a matter of fact, the petitioner himself examined an official from the office of Income Tax, Parwanoo, who appeared and stated that for the assessment year 1996-97 the income of the petitioner was Rs. 40,000/- and he had not paid any tax. This witness was not questioned about the income for the assessment year 1997-98.

13. Another contention raised by the appellant is that he has spent huge amount of money on treatment. However, no voucher pertaining to medical expenses have been produced.

14. The Tribunal has returned the finding, which stands affirmed by this Court hereinabove, that both the petitioner and deceased Shera, who were driving the motor-cycle and the scooter, respectively, were guilty of negligence. That means, this is a case of contributory negligence. If, that is so, the total compensation assessed for the injury was required to be reduced by 50%. In the present case, the Tribunal has awarded a sum of Rs. 1,50,000/- without giving any break up as to what amount has been awarded under what head. The presumption is that the Tribunal has awarded this amount by taking into account that the petitioner was guilty of contributory negligence. If the petitioner was not guilty of contributory negligence, presumably the Tribunal would have awarded double the amount awarded by it.

15. As a result of the above discussion, appeal filed by the petitioner, i.e. FAO No. 231 of 2001 is dismissed.

16. Turning to the second appeal (FAO No. 530 of 2000), which has been filed by the Insurance Company, the insured, respondent Rani Sood, has taken the plea that the scooter had been taken away unauthorisedly from outside the shop of her husband by Shera and, therefore, she is not guilty of breach of condition of the insurance policy pertaining to the person entitled to drive the scooter. To prove the plea, she examined her husband RW 1 Jiwan Sood, who testified that the scooter had been taken away from outside his

shop by Shera without his permission and even without informing him and that after some time when he found that the scooter was not there, he deputed his servant Hari Krishan to search for the scooter and he himself also started searching for the scooter, and that around 11.00 a.m. when they were searching for the scooter, a message was received telephonically from the police that the scooter had met with an accident. This part of his statement has remained un- controverted. Now, if Shera had taken away the scooter without the consent of the owner or her husband and even without informing them, the insured would not be liable for breach of the condition of the policy, even if it be assumed that Shera did not possess a valid driving licence. The Hon'ble Supreme Court in **National Insurance Co. Ltd**. Vs. **Swaran Singh and others** [2004 (3) SCC 297] has held that where there is breach of policy condition, e.g. disqualification of the driver, the mere proof of the absence of the driving licence will not be enough to absolve the insurance company and that the insurance company in order to successfully avoid its liability has further to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the conditions of the policy as to the use of the vehicle by a duly licenced driver. In the present case, the evidence shows that Shera took away the scooter stealthily from outside the shop of the husband of the insured, where it had been parked by her husband. Therefore, the insured cannot be said to have committed the breach of the aforesaid condition of the policy.

17. As regards the second contention raised by the Insurance Company, viz. the amount of compensation is required to be reduced to 50%, on account of the finding that the petitioner was guilty of contributory negligence, the same requires rejection for two reasons. Firstly, as held hereinabove, the amount of compensation awarded by the Tribunal is to be presumed to have been worked out after making a cut, on account of the contributory negligence on the part of the petitioner. Secondly, by now it is very well settled that an insurer can challenge an award in appeal only on those grounds, which it can raise by way of a defence, under Section 149 (2) of the Motor Vehicles Act and under the aforesaid provision of Motor Vehicle Act, the insurer is not permitted to raise any defence about the quantum of compensation.

18. For the foregoing reasons, appeal filed by the Insurance Company is also dismissed.

November 6, 2006. **(Surjit Singh)**
(*Hem*) **Judge.**

1. <u>FAO(MVA) No. 231 of 2001</u>.

Kapil Dev .....Appellant.

Versus

Rani Sood & anr. .... Respondents.

For the appellant: **Mr. Raman Sethi, Advocat.e**

For the respondents: **Mr. Ramakant Sharma, Advocate, for respondent No.1.**

Mr. Ashwani K. Sharma, Advocate, for respondent No. 2.

2. <u>FAO(MVA) No. 530 of 2000</u>.

National Insurance Co. Ltd. .....Appellant.

Versus

Kapil Dev & anr. .... Respondents.

For the appellant: **Mr. Ashwani K.Sharma, Advocate.**

For the respondents: **Mr. Raman Sethi, Advocate for respondent No. 1.**

Mr. Ramakant Sharma, Advocate, for respondent No.2.